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In The

Supreme Court of the United States

October Term 1973

No. 73-

JOSEPH SCAPPATONE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

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No. 73-

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT

Petitioner respectfully prays that this Court will grant a Writ of Certiorari to review the order of the United States Court of Appeals for the Second Circuit rendered the 15th day of March, 1974, affirming the judgment of the United States District Court for the Southern District of New York rendered the 2nd day of November, 1973, convicting Scappatone and a co-defendant, Perry Maurino, of the crimes of conspiracy to possess property stolen from an interstate shipment and a substantive charge of possession of property stolen from an interstate shipment, after trial before Tenney, J., and a jury.

OPINION BELOW

The Court of Appeals rendered no opinion in affirming the judgment of conviction.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The Court of Appeals for the Second Circuit affirmed the judgment of conviction here on the 15th day of March, 1974.

QUESTIONS PRESENTED

1. Whether petitioner was properly convicted of violating Section 659 of Title 18 United States Code, inview of the fact that the vehicle from which the property allegedly stolen was taken was not moving in interstate commerce at the time of the alleged theft?

2. Whether the indictment charging a violation of Section 659 of Title 18 United States Code is constitutionally valid in view of the fact that it does not state where the alleged motor truck or platform or depot was located at the time of the alleged theft or misappropriation of property (Article I, Section 8 — Commerce Clause, United States Constitution; Fifth Amendment, United States Constitution)?

3. Whether petitioner was denied a Sixth Amendment right requiring proper notification of the accusations against him by virtue of the vagueness of the indictment herein which failed to disclose specifically what aspects of interstate commerce were actually involved?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution Commerce Clause, Article I, Section 8, Sixth Amendment and the Fifth Amendment Due Process Clause are involved herein. In addition, Section 659 of Title 18 United States Code is also involved.

THE FACTUAL BACKGROUND OF THE CASE

The defendants were indicted quite some time after a certain electronic microscope was stolen from the alleged owner thereof, the Phillips Electronic Corporation, which had an office in New York State.

Originally three individuals were arrested and charged with the crime and each of them ultimately pleaded guilty. Subsequently, the petitioner Scappatone and the co-defendant Perry Maurino, were indicted for the aforesaid crimes, namely possession of material stolen from an interstate shipment. The indictment does not indicate where the shipment was located at the time of the theft. In other words, there is no indication whatsoever revealing from where the items were stolen and, therefore, it cannot be determined whether or not the produce was in interstate commerce.

Count Two of the indictment reads:

"COUNT TWO

The Grand Jury further charges:

From on or about the 16th day of June, 1970, to on or about the 13th day of August, 1970,

> Perry Maurino and Joseph Scappatone the defendants, unlawfully, wilfully and knowingly did have in their possession certain goods and chattels to wit, cartons containing parts of electron microscopes valued at approximately $120,000 which goods and chattels had been stolen, embezzled, taken, carried away and obtained by fraud and deception from motor trucks and from platforms and depots while such goods and chattels were moving as and constituted an interstate shipment of property, knowing those goods and chattels to have been embezzled and stolen.
>
> (Title 18, United States Code, Sections 659 and 2.)"

It was alleged that Scappatone who, with his family, operated a private refuse collection corporation, had, at one time, housed the truck from which the electronic microscope was allegedly stolen. This was apparently the only link that Scappatone had, other than testimony from the accomplices who had already pleaded guilty, stating that he had also shared to some extent in the proceeds of the theft.

The crucial fact, however, is that the indictment does not indicate the interstate character of the shipment and, consequently, it is therefore defective.

It is submitted that it constituted a denial of due process of law and does not conform with the Commerce Clause of Article I, Section 8 of the United States Constitution, since jurisdiction in this case must be based upon interstate commerce.

REASONS FOR GRANTING THE WRIT

I.

The indictment herein fails to reveal from which depot, station or other location the merchandise involved was stolen. The indictment is vague and speaks only in generalities and therefore does not indicate that the transaction involved interstate commerce. It is submitted that an essential allegation of the indictment was to specifically indicate from where the alleged stolen items were actually taken. This deprived the petitioner of due process of law and also revealed a dearth of jurisdiction under the Commerce Clause.

There are constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error, and reversal is required without regard to a showing of prejudice and without regard to the strength of the evidence. The pertinent constitutional provisions of the Sixth Amendment, requiring notice of the accusation, and the Fifth Amendment guarantee that no person shall be prosecuted for a felony except by indictment. (*Russell v. United States*, 369 U.S. 749; *Stirone v. United States*, 361 U.S. 212, 217, wherein a material variance between the allegations of the indictment and the proof was held to be constitutionally defective; *United States v. DeCavalcante*, 440 F.2d 1264 (3 Cir. 1971).

It is elementary that unless the Government was able to establish that the goods involved had been travelling in interstate commerce at the time of their theft, that no jurisdiction lay in this case. The count of the indictment which is quoted *supra*, reveals that there is only a vague reference to the fact that the electronic microscopes were

stolen from "*trucks*" and stations and depots. Actually only *one* truck was involved herein and therefore the indictment is completely vague and inaccurate.

Additionally, it does not say where these particular trucks, stations or depots were located. We submit that the location of these items were extremely important.

See *United States v. Manuszak*, 234 F.2d 421, 423 (3 Cir. 1956); *Stirone v. United States*, *supra*.

In *United States v. Manuszak*, *supra*, the Circuit Court aptly explains:

> "Under this statute, it is not a federal crime to steal goods from an interstate shipment of freight unless the goods are taken from one of the specifically enumerated places or facilities. Other thefts, although of goods which are part of an interstate shipment, are not federal crimes. That being so, an indictment which only charges a theft of goods from an interstate shipment of freight without alleging that the goods were taken from one of the specifically enumerated places or facilities does not charge all the essential ingredients of a crime so far as the federal government is concerned. *Wolkoff v. United States*, 6 Cir., 1936, 84 F.2d 17; *United States v. Cohen*, 3 Cir. 1921, 274 F. 596; *United States v. McCulloch*, D.C. Ind. 1947, 6 F.R.D. 559."

In *Stirone v. United States*, the Supreme Court also considered an appeal from a judgment of conviction of the Third Circuit (262 F.2d 571). In *Stirone*, the petitioner

there was indicted and convicted in the federal District Court for interfering with interstate commerce by extortion in violation of the Hobbs Act. The only interstate commerce mentioned in the indictment however, was the importation into Pennsylvania of sand to be used in building a steel plant there; but the trial judge, however, permitted the introduction of evidence to show interference also with the exportation from Pennsylvania of steel to be manufactured in the new plant, and he instructed the jury that it could base a conviction upon interference with either the importation of sand or the exportation of steel. This was considered a material deviation between the pleading and the proof and the United States Supreme Court held that the conviction therefore had to be reversed.

In essence, the Supreme Court of the United States stated that the variance between the pleading and proof was not insignificant and could not be dismissed as harmless error [as was done in the case at bar] because it deprived the petitioner of his substantial right to be tried for a felony only on the charges presented in an indictment returned by a Grand Jury.

In *Stirone v. United States, supra*, the Supreme Court aptly explained (361 U.S. at 215, 216) the following:

> "Ever since *Ex parte Bain*, 121 U.S. 1, was decided in 1887 it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself. In that case, the court ordered that some specific and relevant allegations the grand jury had charged be stricken from the

indictment so that Bain might be convicted without proof of those particular allegations. [2] In holding that this could not be done, Mr. Justice Miller, speaking for the Court, said:

'If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says "no person shall be held to answer." may be frittered away until its value is almost destroyed.' 121 U.S. 1, 10.

The Court went on to hold in *Bain*:

'that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney . . . .' 121 U.S. 1, 13.

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2. Bain was indicted for making a false statement 'with intent to decieve *the Comptroller of the Currency and* the agent appointed to examine the affairs of said association . . . .' After sustaining demurrers of Bain to the indictment, the trial court went on to say that 'thereupon, on motion of the United States, by counsel, the court orders that the indictment be amended by striking out the words "*the Comptroller of the Currency and*" therein contained.' By this amendment it was intended to permit conviction of Bain without proof that he had deceived the Comptroller as the grand jury had charged."

It would appear that there is no greater stretching of the imagination to make the alteration of the indictment in *Stirone* as there was in the case at bar. As a matter of fact, the *Stirone* case which reversed a Third Circuit determination, is certainly apt authority for the proposition that this Court should not deviate from the long-established rule in this Court that a District Judge may not at his whim amend the allegations of an indictment to conform to the proof.

Rule 52(a) F.R.Cr. P. cannot be interpreted as meaning that it is *de minimus* to permit the amendment of an indictment.

In *Stirone v. United States, supra*, 361 U.S. at 217, the Supreme Court continued showing that there has been a consistent line of authority which has forbidden the very activities which the Panel below has apparently now approved:

> "The *Bain* case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him. See also *United States v. Norris*, 281 U.S. 619, 622. Cf. *Clyatt v. United States*, 197 U.S. 207, 219, 220. Yet the court did permit that in this case. The indictment here cannot fairly be read as charging interference with movements of steel from Pennsylvania to other States nor does the Court of Appeals appear to have so read it. The grand jury which found this indictment was satisfied to charge that Stirone's conduct interfered with interstate importation of sand. But neither this nor any other court can know that the grand jury would have been willing

> to charge that Stirone's conduct would interfere with interstate exportation of steel from a mill later to be built with Rider's concrete. And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned. Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same. And the addition charging interference with steel exports here is *neither trivial, useless, nor innocuous.* Compare *Ford v. United States*, 273 U.S. 593, 602; *Goto v. Lane*, 265 U.S. 393, 402. While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. *Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error.*"

The United States Supreme Court did not consider for one moment that the deviation in the *Stirone* case was something minor. At another juncture of the opinion the Supreme Court explained further that it was essential that if a conviction occur at all that it be predicated upon the allegations of the indictment and not the amendments to those allegations as engrafted by some judge or prosecutor without knowledge or approval of the Grand Jury. Thus, at 361 U.S. 218, the Court finally explained:

> "The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens

> acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for interference with interstate commerce which the grand jury did not charge."

It is therefore respectfully submitted that there was no indication that the truck carrying the microscopes was located at any particular place from looking at the indictment itself. Additionally, there certainly was no evidence that the truck was moving in interstate commerce. In any event, there was an insufficient detailing of the accusations against petitioner to apprise him of the specific charges involved.

For the foregoing reasons, it is respectfully submitted that certiorari should be granted.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

APPENDIX

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of March one thousand nine hundred and seventy-four.

Present: HON. PAUL R. HAYS

HON. WILLIAM H. TIMBERS
Circuit Judges

HON. OSCAR H. DAVIS
Court of Claims

Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

73-2673

Order

Perry Maurino and
Joseph Scappatone,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN,
Chief Deputy Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1549

JOSEPH SCAPPATONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the goods he was convicted of possessing were not part of an interstate shipment when stolen and that the indictment was invalid because it did not specifically indicate the location at which the theft occurred.

Following a jury trial in the United States District Court for the Southern District of New York, petitioner and a co-defendant were convicted of conspiring to possess (count 1) and possessing (count 2) two electron microscopes worth $120,000 which had been stolen from an interstate shipment, in violation of 18 U.S.C. 371 and 659. Petitioner was sentenced, subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2), to a term of 18 months' imprisonment on count 1 and one year's imprisonment on count 2; execution of the sentence on count 2 was suspended and petitioner was

placed on probation for a term of two years to commence upon completion of his imprisonment under count 1. The court of appeals affirmed without opinion (Pet. App.).

The evidence at trial revealed that on June 15 and 16, 1970, a truck driver for Philips Electronic Instruments of Mount Vernon, New York, picked up two unassembled electron microscopes at a foreign trade zone in Staten Island, New York, where they had been deposited after being shipped to the United States from the manufacturing plant in Holland (T. 28-30, 38). On the evening of June 16, 1970, the driver left the truck, with the two unassembled electron microscopes locked inside, parked in the driveway of the Philips Electronic Instruments property in Mount Vernon, New York, ready for an early departure for the deliveries in Massachusetts which he had been instructed to make the next day. In the cab of the truck were bills of lading and packing lists showing that one microscope was to be delivered to the Beth Israel Hospital in Boston and the other to the Marine Biological Laboratory in Woods Hole (T. 33-35). However, when he returned early the next morning to begin his trip to deliver the microscopes, the driver found that the truck had disappeared (T. 35).

In July 1970, petitioner's co-defendant, Perry Maurino, approached Carl French and told him that he had some "stuff" that they could make some money on but that he did not know what it was. Maurino showed French "a packing slip, or something to that facsimile, a piece of paper with a lot of number[s] on it" (T. 76-78). Maurino gave French the packing slip and told him that if he could find out what these goods were, French would share in the proceeds (T. 77). When French was unable to find out what the goods were— "one guy said it was Sonar equipment"—Maurino contacted Tony Dos Santos, who de-

termined that the goods were "electronic microscopes" (T. 78-79, 199). Maurino found the market for "electronic microscopes" rather limited (T. 79). He suggested that French find out whether or not a ransom could be obtained for the return of the microscopes (T. 80).

On Maurino's instructions, French and Dos Santos began negotiations with the insurance company. At one point, however, the insurance company insisted that it be given the serial numbers of the microscopes as a demonstration that French and Dos Santos actually had the microscopes (T. 81). Maurino then took French to petitioner's garage in the Bronx, where the microscopes were stored. There French met petitioner and the three men obtained the serial numbers from the microscopes (T. 81-82).

Additional negotiations resulted in an agreement with the insurance company that $12,000 would be paid for the return of the microscopes (T. 87). French and Maurino agreed to split the proceeds, with petitioner to share in Maurino's half (T. 88-89).

Pursuant to a schedule worked out with the insurance company, the microscopes were then delivered from petitioner's garage to the Philips warehouse in three loads. On each occasion petitioner assisted in loading the delivery truck (T. 90, 94, 97-98, 265-271). On each delivery, the truck was driven by William Karabinos, whose services had been obtained by French. After each delivery, Karabinos picked up a partial payment from the insurance company and returned it to French. After the second delivery, French paid a portion of the money to Maurino (T. 96). After the third delivery, petitioner complained that Maurino had given him nothing from the prior payment and French then paid him directly (T. 97-99).

Neither petitioner nor his co-defendant testified or presented any evidence.

1. Petitioner contends that when the electron microscopes were stolen they were not part of a shipment which was moving in interstate commerce. The evidence showed, however, that the microscopes had begun their movement in interstate commerce when they were picked up at Staten Island on June 15 and 16, 1970, and brought to Mount Vernon, from which they were to be transported to Boston and Woods Hole on June 17.

Even assuming that the shipment originated in Mount Vernon rather than Staten Island, the jury could properly find that the microscopes were part of an interstate shipment when they were stolen. They had been locked inside the truck that was to transport them to Massachusetts the following day. The driver had taken custody of the microscopes with instructions to deliver them to the Boston and Woods Hole addresses. He had been given the bills of lading and packing lists for the microscopes and had placed the documents on the truck's dashboard. He had parked the truck in the driveway of Philips Electronic Instruments pending his arrival the next morning to drive it to Massachusetts. See *United States* v. *Astolas*, 487 F. 2d 275 (C.A. 2), certiorari denied April 22, 1974 (Nos. 73-1057, 73-1058); *United States* v. *Parent*, 484 F. 2d 726 (C.A. 7), certiorari denied February 19, 1974 (No. 73-5622); *United States* v. *Yoppolo*, 435 F. 2d 625 (C.A. 6); *United States* v. *Thomas*, 396 F. 2d 310 (C.A. 2).

2. Petitioner also contends that the indictment was invalid because it did not "specifically indicate from where the alleged stolen items were actually taken" (Pet. 5). This issue was not raised in the court of appeals (nor, apparently, in the district court). "Only in exceptional cases will this Court review a question not raised in the

court below" (*Lawn* v. *United States*, 355 U.S. 339, 362, n. 16). There are no such exceptional circumstances in this case.

In any event, the indictment, a copy of which we are lodging with the Clerk, alleged each element of the offenses it charged and was sufficiently detailed to apprise petitioner of what he must be prepared to meet. See *Hagner* v. *United States*, 285 U.S. 427, 431; *Russell* v. *United States*, 369 U.S. 749, 763-764. If petitioner needed further information to prepare his defense, the appropriate course would have been to file a motion for a bill of particulars pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure. See *United States* v. *Keine*, 424 F. 2d 39 (C.A. 10), certiorari denied, 400 U.S. 840; *United States* v. *Branan*, 457 F. 2d 1062 (C.A. 6); *United States* v. *Barbato*, 471 F. 2d 918, 921 (C.A. 1).

Contrary to petitioner's assertion, it was not necessary for the indictment to state the precise location from which the microscopes were stolen. *United States* v. *Manuszak*, 234 F. 2d 421 (C.A. 3), on which petitioner relies, holds only that the indictment must allege that the goods were stolen "from one of the specifically enumerated places or facilities" in 18 U.S.C. 659 (*id.* at 423). Among the facilities "specifically enumerated" in that section are motor trucks, platforms, and depots. The indictment in this case specified that the microscopes had been stolen from "motor trucks and from platforms and depots."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1974.